Missouri Law Review

Volume 54
Issue 3 *Summer 1989*

Article 8

Summer 1989

Withdrawal of Nutrition and Hydration from Incompetent Patients in Missouri

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WITHDRAWAL OF NUTRITION AND HYDRATION FROM INCOMPETENT PATIENTS IN MISSOURI

Cruzan ex rel. Cruzan v. Harmon[1]

I. INTRODUCTION

May a guardian order that a hospital withhold all nutrition and hydration from an incompetent ward who is in a persistent vegetative state but not terminally ill? That is the question presented in *Cruzan ex rel. Cruzan v. Harmon*.[2] In this case of first impression, the Missouri Supreme Court answered no.[3]

In surveying earlier decisions dealing with similar issues, the Missouri Supreme Court identified fifty-three decisions by courts in sixteen states. Of those decisions, the *Cruzan* court wrote, "Nearly unanimously, those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought."[4] In response to the growing number of court decisions permitting life-sustaining aid to be withheld, the *Cruzan* court declared, "We have found them wanting and refuse to eat 'on the insane root which takes the reason prisoner.'"[5]

In January, 1983 Nancy Cruzan overturned the automobile she was driving. She was found thirty-five feet away, lifeless and not breathing.[6] Rescuers restored her breathing and circulation, but not before she had been deprived of oxygen for an estimated twelve to fourteen minutes.[7] She was in a coma for three weeks before showing any improvement.[8] Her husband consented to the surgical implantation of a gastrostomy tube to

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1. Cruzan *ex rel.* Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988) (en banc), *cert. granted sub nom.* Cruzan *ex rel.* Cruzan v. Director, Missouri Dep't of Health, 57 U.S.L.W. 3859 (U.S. July 3, 1989) (No. 88-1503).
2. *Id.* at 412.
3. *Id.* at 410.
4. *Id.* at 412-13.
5. *Id.* at 412 n.5 (quoting SHAKESPEARE, MACBETH, I, iii.).
6. *Id.* at 430 (Higgins, J., dissenting) (quoting the trial court).
7. *Id.* at 411.
8. *Id.*

facilitate her feeding and to aid her recovery.[9] Despite rehabilitative efforts, Nancy Cruzan remains in a "persistent vegetative state" (PVS), unable to care for herself.[10] Her only reactions to her surroundings are grimaces in response to painful stimuli and an apparent response to sounds. While she is not terminally ill, there is no hope for improvement in her condition.[11]

Nancy Cruzan's parents (co-guardians) requested termination of artificial nutrition and hydration, but employees of the Mount Vernon State Hospital refused to comply with the request without a court order.[12] The family sought a declaratory judgment sanctioning the removal of her feeding tube.[13] After a hearing, the trial court ordered the hospital to comply with the request.[14]

The trial court found that Nancy had made comments to a friend "that if sick or injured she would not wish to continue her life unless she could live at least halfway normally."[15] In the trial court's view, Nancy's comments suggested that "given her present condition she would not wish to continue on with her nutrition and hydration."[16] The trial court held that the fundamental "right of liberty" found in both the Missouri and United States Constitutions permits an individual to refuse "artificial death-prolonging procedures when the person has no more cognitive brain function than our Ward."[17] To deny the co-guardians authority to exercise Nancy's right to refuse nutrition and hydration would deny her the equal protection of the law.[18] The appeal was taken directly to the Missouri Supreme Court.[19]

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9. *Id.*

10. *Cruzan*, 760 S.W.2d at 411. A persistent vegetative state (PVS) is defined as the irreversible loss of higher brain function. While the patient will have wake and sleep cycles and possibly eye movements, the PVS is characterized by the lack of conscious interaction with the environment. Since a significant number of such patients regain independent function after short periods in a vegetative state, physicians cannot diagnose PVS with certainty until a number of months have passed. Johnson, *Withholding Fluids and Nutrition: Identifying the Populations at Risk*, 3 ISSUES IN L. & MED. 189, 195-96 (1986).

11. *Cruzan*, 760 S.W.2d at 411.

12. *Id.* at 410.

13. *Id.*

14. *Id.*

15. *Id.* at 433 (Higgins, J., dissenting) (quoting the trial court).

16. *Id.*

17. *Id.* at 434 (Higgins, J., dissenting) (quoting the trial court). The trial court referenced MO. CONST. art. I, §§ 2, 10 and U.S. CONST. amend. XIV. The trial court also held Missouri's Living Will statute, MO. REV. STAT. §§ 459.010-.055 (1986), unconstitutional "to the extent that the statute or public policy prohibits withholding or withdrawal of nutrition and hydration or euthanasia or mercy killing" when applied in every circumstance. *Cruzan*, 760 S.W.2d at 434. The *Cruzan* court reversed the trial court's finding of unconstitutionality. *Id.* at 420.

18. *Cruzan*, 760 S.W.2d at 434. The trial court, while directing the hospital to carry out the respondent's request, held that the decision to remove the tube

II. THE ISSUES

The *Cruzan* court began its analysis of the issues by evaluating the right to refuse medical treatment, both from a common law and a constitutional right to privacy perspective.[20] In examining the state interests involved, the court focused on the state's interest in the preservation of life.[21] The *Cruzan* court held the state interest in life more weighty than the patient's right to refuse nutrition and hydration—a decision that diverged sharply from decisions in other jurisdictions.[22] Finally, the court questioned the validity of third party consent.[23] Again breaking with the majority of courts,[24] the *Cruzan* court found no basis for a guardian to authorize withdrawal of nutrition and hydration.[25]

The Right to Refuse Treatment

The common law right to refuse medical treatment derives from the principle that treatment administered without consent is a battery.[26] The *Cruzan* court noted, "The doctrine of informed consent arose in recognition of the value society places on a person's autonomy and as the primary vehicle by which a person can protect the integrity of his body."[27] The necessary corollary to informed consent is the right to refuse medical treatment: "If one can consent to treatment, one can also refuse it."[28]

In *Cruzan*, the court cited three criteria for a valid, informed consent to a medical treatment: the "patient must have the capacity to reason and make judgments;" the "decision must be made voluntarily and without coercion;" and the "patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or non-treatment, along

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was the guardian's and could be exercised in keeping with their ward's best interests. *Id.*

19. *Id.*, 760 S.W.2d at 410. The *Cruzan* court did not explain the basis of its jurisdiction except to cite MO. CONST. art. V, § 3, which provides in part: "The supreme court shall have exclusive appellate jurisdiction involving the validity of a . . . statute . . . of this state . . . ." While the court did not expressly state its jurisdictional grounds, jurisdiction might have been premised upon the trial court's challenge of the constitutionality of the Living Will statute. *See supra* note 17.

20. *Cruzan*, 760 S.W.2d at 416-18.

21. *Id.* at 419.

22. *Id.* at 424.

23. *Id.*

24. *See infra* notes 119-31 and accompanying text.

25. *Cruzan*, 760 S.W.2d at 424-26.

26. *Cruzan*, 760 S.W.2d at 417.

27. *Id.*

28. *Id.*

with a full understanding of the nature of the disease and the prognosis."[29]

In light of these requirements, the *Cruzan* court found it "definitionally impossible for a person to make an informed decision—either to consent or to refuse—under hypothetical conditions."[30] For the court, a decision to refuse treatment—especially when that refusal means death—should be as informed as any decision to accept treatment.[31] The court then found the evidence of Nancy Cruzan's consent "woefully inadequate" and held there had been no informed consent.[32]

In other jurisdictions, courts have been willing to find consent by incompetent patients upon lesser demonstrations of the patient's wishes.[33] A number of New York courts have used the common law right to refuse treatment as the basis for their decisions in cases involving the removal of life-sustaining treatment for incurable incompetents.[34] In contrast to most jurisdictions (but similar to *Cruzan*) New York courts have been relatively rigid in their requirements for establishing informed consent, holding that "no one should be denied essential medical care unless the evidence clearly and convincingly shows that the patient intended to decline the treatment under some particular circumstance."[35]

The court, in *In re Eichner*,[36] gave this common law right as the reason for allowing the removal of a respirator from an elderly religious brother who had suffered cardiac arrest and severe brain damage during surgery. The *Eichner* court held that life-sustaining treatment could be removed only on the basis of clear and convincing evidence of the patient's expressed wishes.[37] The court found that Brother Fox had made "solemn pron-

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29. *Id.* (quoting Wanser, Adelstein, Cranford, Federman, Hook, Moertel, Safer, Stone, Taussig, & Van Eys, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED. 955, 957 (1984)).

30. *Id.*

31. *Id.* at 424.

32. *Id. See supra* note 15 and accompanying text.

33. Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); *In re* Eichner, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied sub nom. In re* Storar, 454 U.S. 858 (1981). *See also infra* notes 122-31 and accompanying text regarding substituted judgment.

34. *In re* Westchester County Medical Center, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988) (withdrawal of nutrition and hydration from incompetent patient requires clear and convincing proof of patient's specific wishes); People v. Eulo, 63 N.Y.2d. 341, 482 N.Y.S.2d 436, 472 N.E.2d 286 (1984) (follows *Storar* and holds that third party may not make withdrawal decision for patient); *In re* Eichner, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981) (respirator removed from PVS patient in keeping with his prior explicit statements).

35. *Westchester County Medical Center*, 72 N.Y.2d at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

36. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied sub nom. In re* Storar, 454 U.S. 858 (1981).

37. *Id.* at 378, 420 N.E.2d at 71, 438 N.Y.S.2d at 274.

ouncements and not casual remarks" about his convictions concerning the use of a respirator on patients in a persistent vegetative state.[38]

Recently, the New York Court of Appeals in *In re Westchester County Medical Center*[39] authorized a hospital to insert a nasogastric feeding tube into a mentally incompetent, elderly stroke victim despite objections from her daughters.[40] The court based its refusal to withhold food on the lack of clear and convincing evidence of the patient's desires under those circumstances.[41] In a footnote, the *Westchester* court compared the situation to conveyances of real property which must be made with specificity and in writing; likewise, a will requires great formality. The court reasoned that it is not "unrealistic" to build in the same formalities to protect a person's life as the law accords a person's property.[42] Other jurisdictions have based the withdrawal of nutrition and hydration upon the common law right to refuse treatment, and have frequently combined that argument with a constitutional right to privacy argument. The level of consent required has ranged from a competent patient's full, informed consent[43] to third party decisions made for incompetent patients with varying findings about the patient's earlier expressed wishes.[44]

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38. *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. Fox had conducted "formal" discussions in his role as a Catholic teacher. In the context of discussing the Karen Quinlan case, he had said he would want nothing extraordinary done to keep him alive. *Id.* In *Eichner*'s companion case, *In re Storar*, the New Jersey court refused to permit the discontinuance of blood transfusions to a retarded adult suffering from terminal cancer because the court felt it was impossible to determine the wishes of a person incompetent from birth. *Id.* at 380-82, 420 N.E.2d at 73, 438 N.Y.S.2d at 275-76.

39. 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

40. *Id.*

41. *Id.* at 532-34, 531 N.E.2d at 614-15, 534 N.Y.S.2d at 892-94. The patient had once stated: "I would never want to be a burden on anyone and I would never want to lose my dignity before I passed away." She had also said that it is "monstrous" to keep someone alive with "machinery, things like that" when they were "not going to get better." *Id.* at 526-27, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

42. *Id.* at 531, 531 N.E.2d at 614, 534 N.Y.S.2d at 893 n.4.

43. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (removal of nasogastric tube from "intelligent, mentally competent" 28-year-old quadriplegic with cerebral palsy). *See also In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987).

44. *See, e.g.*, Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987) (removal of nasogastric tube from PVS patient may be exercised by guardian, if in patient's "best interests"); McConnell v. Beverly Enterprises-Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989) (allowed removal of g-tube of PVS patient at request of family); Brophy v. New England Sinai Hosp. Inc., 398 Mass. 417, 497 N.E.2d 626 (1986) (guardian permitted to exercise the PVS patient's right to remove g-tube—"substituted judgment"). *See infra* notes 119-31 and accompanying text for discussion of "substituted judgment" and the "best interests" analysis.

The Patient's Constitutional Right to Privacy

The *Cruzan* court briefly considered the issue of a constitutional right to refuse treatment.[45] The court found no express right to privacy in the Missouri Constitution, nor did it find any unfettered interest that "would support the right of a person to refuse medical treatment in every circumstance."[46] Turning to the federal constitution, the *Cruzan* court noted that the United States Supreme Court had not specifically enlarged the right to privacy to allow a patient or guardian to order the withdrawal of food and water. The court determined that no such right was embodied in the penumbral right to privacy,[47] and emphasized that, in *Bowers v. Hardwick*,[48] the United States Supreme Court had refused to extend the right to privacy beyond the bounds of marriage and procreation. To do so would amount to the discovery of a new right.[49] Concluding its privacy analysis, the *Cruzan* court expressed "grave doubts" as to the existence of any federal constitutional right of refusal by which food and water might be denied an incompetent patient.[50]

Many state courts, beginning with the seminal case of *In re Quinlan*,[51] have based the right to refuse medical treatment upon either a state or federal constitutional right to privacy. These decisions are primarily based upon the recognition of the right to personal privacy found in *Roe v. Wade*.[52]

A federal court has also recognized a constitutional right to refuse treatment in *Gray v. Romeo*,[53] a case very similar to *Cruzan*. In *Gray*, the court held that Marcia Gray, a patient in a PVS, had a constitutional right to have her feeding tube removed.[54] Citing *Roe*, the *Gray* court recognized that this right of privacy was not absolute but must be balanced against state interests.[55] Still, the court found no state interest sufficient to override that right.[56]

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45. *Cruzan*, 760 S.W.2d at 417-18.
46. *Id.* at 417.
47. *Id.* at 418.
48. 478 U.S. 186 (1986) (right to privacy does not extend to homosexual conduct).
49. *Cruzan*, 760 S.W.2d at 418.
50. *Id.*
51. 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (authorized removal of respirator from PVS patient).
52. 410 U.S. 113 (1973).
53. 697 F. Supp. 580 (D.R.I. 1988).
54. *Id.* at 586.
55. *Id.* at 588. *See infra* notes 57-60 and accompanying text.
56. 697 F. Supp. at 588-90. See discussion of state interests *infra* notes 57-74 and accompanying text.

Competing State Interests

In the *Cruzan* case, the court recognized four state interests which must be balanced against any right to refuse treatment or right to privacy:[57] the prevention of homicide and suicide; the protection of innocent third parties,[58] the protection of the medical profession's integrity;[59] and the preservation of life. The court focused only on the preservation of life interest.[60]

The analysis of the life interest included two components. First, the court assessed the state interest in the prolongation of life[61] and held that this interest is highest where illness is curable.[62] On the other hand, the interest in prolonging life "wanes where the underlying affliction is incurable and 'would soon cause death regardless of any medical treatment.'"[63] Since Nancy Cruzan is not terminally ill, the court that found the state interest in prolonging life was valid.[64]

The second component of the analysis is the "state's concern with the sanctity of life [which] rests on the principle that life is precious and worthy of preservation without regard to its quality."[65] The *Cruzan* court referred to Missouri statutes which demonstrate the state's interest in the sanctity of life, both at its beginning and at its end. The court cited Missouri Revised Statutes section 188.010[66] which announces the "intention of the General Assembly of Missouri to grant the right to life to all humans, born and unborn."[67]

At the opposite end of the spectrum, the *Cruzan* court quoted Missouri's Living Will statute,[68] to illustrate the state's interest in life near its end. The statute allows a competent person to declare, in advance, that no treatment which merely prolongs the dying process should be administered

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57. *Cruzan*, 760 S.W.2d at 419.

58. *E.g.*, where a patient has minor children who would lose their means of support.

59. The American Medical Association adopted guidelines in 1986 which would permit the discontinuance of nutrition or hydration under the facts of this case. *Cruzan*, 760 S.W.2d at 423 n.18. The *Cruzan* court did not discuss personal objections to court-ordered withdrawal of nutrition and hydration by individual professionals.

60. *Id.* at 419.

61. *Id.*

62. *Id.* (citation omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. MO. REV. STAT. § 188.010 (1986).

67. *Cruzan*, 760 S.W.2d at 419.

68. MO. REV. STAT. §§ 459.010-.055 (1986). The court emphasized that the statute was not applicable to the instant case, but served only to show the state's interest in the sanctity of life. *Cruzan*, 760 S.W.2d at 420.

if the declarant becomes incompetent, irreversibly ill, and will die within a relatively short time.[69] The provision of nutrition and hydration is not within the definition of "death prolonging procedures," and may not be withheld or withdrawn.[70] The recommended form of the declaration is, "It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life rather only to permit the natural process of dying."[71]

Having established the state's interest in life, the court in *Cruzan* cautioned against measuring the patient's quality of life in assessing the state interest in life. The preservation of life could never be equated with quality of life. The court stated: "Were quality of life at issue persons with all manner of handicaps might find the state seeking to terminate their lives. Instead the state's interest is in life; that interest is unqualified."[72]

In considering state interests, the *Cruzan* court, while adopting the conceptual framework developed in other jurisdictions, reached an entirely different result.[73] Earlier court decisions more often found the state's interest in preserving life less compelling, especially when measured against the strong right to refuse treatment found in most jurisdictions.[74]

Are Nutrition and Hydration Different?

A critical test in *Cruzan* was the balance between the right to refuse nutrition and hydration against the state's interest in life. Key concerns in balancing include the inherent differences between "nutrition and hydration" and other medical treatments.[75] In this area *Cruzan* differs strikingly from other jurisdictions.

With medical treatment, the distinction between ordinary and extraordinary medical treatment is one means of separating the permissible denial of treatment from the impermissible.[76] In *Quinlan*, the New Jersey Supreme Court permitted the removal of a respirator from a patient in a PVS and labeled the use of Karen Quinlan's respirator "extraordinary" treatment.[77] The ordinary/extraordinary terminology, however, is difficult to apply because it turns as much on the patient's condition as it does upon the nature of the treatment in question.[78] For example, the use of a respirator was considered extraordinary treatment in *Quinlin*, but the use of a res-

69. *Cruzan*, 760 S.W.2d at 419; MO. REV. STAT. §§ 459.010-.015 (1986).
70. MO. REV. STAT. § 459.010(3) (1986).
71. MO. REV. STAT. § 459.015.3 (1986).
72. *Cruzan*, 760 S.W.2d at 420.
73. *Id.* at 420-22.
74. *See infra* notes 51-56 and accompanying text.
75. *Cruzan*, 760 S.W.2d at 420-24.
76. For a discussion of the problems in the extraordinary/ordinary approach, see Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).
77. 70 N.J. at 48, 355 A.2d at 667-68.
78. *See id.*

pirator to sustain a patient after surgery would likely be considered merely ordinary.[79] The difficulty in dealing with such a moving target led the *Quinlan* court to abandon the distinction nine years later in *In re Conroy*.[80] The *Conroy* court, while recognizing the "emotional symbolism" of food, rejected any distinction between feeding tubes and other life-sustaining medical treatments.[81] Other state courts have also failed to make such distinctions,[82] while some go further and actually define long-term tube feedings as "not only intrusive but extraordinary."[83]

Rejecting the question of whether a feeding tube was to be considered medical treatment, the *Cruzan* court considered the issue irrelevant.[84] The court concluded that such distinctions merely provided the courts with useful euphemisms which made palatable those decisions that might "seem harsh when explained in plainer language."[85] Even though the *Cruzan* court did not quibble over the feeding versus treatment distinction, it found that food and water, unlike other treatments, "do not treat an illness, they maintain a life."[86] The court said that to insist that such treatment is useless unless it cures is to tread dangerous ground:

> When we permit ourselves to think that care is useless if it preserves the life of the embodied human being without restoring cognitive capacity, we fall victim to the old delusion that we have failed if we cannot *cure* and that there is, then, little point to continue *care*.[87]

While most courts have found tube feedings indistinguishable from other medical procedures,[88] some commentators view the denial of nutrition

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79. *See id.*

80. 98 N.J. 321, 486 A.2d 1209 (1985).

81. *Id.* at ____, 486 A.2d at 1236.

82. *See* Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987); Corbet v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986); *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987).

83. Gray v. Romeo, 697 F. Supp. 580, 588-89 (D.R.I. 1988); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 437, 497 N.E.2d 626, 637 (1986).

84. *Cruzan*, 760 S.W.2d at 423.

85. *Id.* (citation omitted).

86. *Id.*

87. *Id.* (quoting Green, *Setting Boundaries for Artificial Feeding*, 1984 THE HASTINGS CENTER REPORT 12, 13).

88. *See supra* notes 81-82 and accompanying text. Some courts, in viewing nutrition and hydration by feeding tube as medical treatments, appear to demand too much of mere food and water. These courts write as though they expect nutrition and hydration to cure illness, and if it does not, then it is ineffective. The real difficulty is that it is *too effective* in achieving its purpose, for the function of food and water in such patients is no different than its function for any other living organism: to sustain life. *See* Barber v. Superior Ct., 147 Cal. App. 3d at 1016-18, 195 Cal. Rptr. at 489-91; *Cruzan*, 760 S.W.2d at 434 (Higgins, J., dissenting) (quoting the trial court).

and hydration as fundamentally different.[89] One contrast noted is that by withholding nutrition and hydration a patient is relegated to *final* and certain death; final to a biological certainty that does not exist with the denial of other medical or surgical procedures.[90] The experts expected Karen Quinlan to die when her respirator was removed, but she did not. A patient needing insulin, kidney dialysis or a blood transfusion may live without treatment, despite medical opinions to the contrary.[91] But no one survives denial of food and water.

One of the expert witnesses in *Brophy v. New England Sinai Hospital, Inc.*[92] writes that it is a false distinction to differentiate between nutrition and hydration dispensed through a feeding tube and food delivered on a tray.[93] He notes:

> [V]irtually every citizen of twentieth-century post industrial America is in simple fact "fed" by the most advanced and technologically complex system of food stuff production, transportation, preservation, refrigeration, preparation, and distribution that the world has ever seen. The food provided to Paul Brophy or other chronically ill patients is not transformed into an exotic substance by the simple act of pouring it into a gastrostomy tube.[94]

One rationale courts have used to blunt the differences has been to hold that removal of a feeding tube does not cause the patient's death. Whenever nutrition and hydration is discontinued patients die, not from starvation or dehydration, but from whatever underlying illness has prevented their eating and drinking without assistance.[95] One commentator finds this reasoning convenient but illusory:

> Blaming the underlying disease rather than the act of life support removal is romantic but illogical. A person who removed a feeding tube from a recovering patient temporarily dependent on it would have a difficult time persuading anyone that the resulting death was caused by the underlying illness not by the removal of the tube.[96]

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89. One writer amusingly suggests, "If nutrition actually is medical treatment, justice would demand that the American Medical Association open its ranks to many highly deserving chefs." Note, *I.V. Withdrawal: The Severance of Medicine's or Society's Umbilical Cord*, 63 NEB. L. REV. 941, 958 (1984).

90. Derr, *Why Food and Fluids Can Never Be Denied*, 1986 THE HASTINGS CENTER REPORT 28, 28.

91. *Id.*

92. 398 Mass. 417, 497 N.E.2d 626 (1986).

93. Derr, *Why Food and Fluids Can Never Be Denied*, 1984 THE HASTINGS CENTER REPORT 28, 30.

94. *Id.*

95. *See* Gray v. Romeo, 697 F. Supp. 580, 589 (D.R.I. 1988). *See also* Rasmussen v. Fleming, 154 Ariz. 207, ___, 741 P.2d 674, 685 (1987); *In re* Conroy, 98 N.J. 321, ___, 486 A.2d 1209, 1224 (1985); *Brophy*, 398 Mass. at 437-39, 497 N.E.2d at 637-38.

96. Alexander, *Death by Directive*, 28 SANTA CLARA L. REV. 67, 83 (1988).

The not so subtle assertion that feeding tubes are only medical procedures and that removing them does not cause the patient's death serves to bolster the *Cruzan* court's assertion that courts are merely trying to "meet the end sought," namely, to cause the patient's death.[97] When death is both the goal and the inevitable result, it does not help the analysis to pretend that the patient is being *allowed to die* rather than admit that *we are causing the death.*[98]

That death is the goal and not just the unintended result of removing invasive medical procedures is illustrated by cases such as the California Court of Appeal's *Barber v. Superior Court.*[99] At the request of the family, who "wanted all machines taken off that are sustaining life," doctors removed a respirator from a patient in a vegetative state.[100] Upon removal of the respirator the patient did not die. The patient's I.V. feeding tube was then removed; six days later the patient died of dehydration.[101]

In nearly every instance, including the *Cruzan* case, the guardians are not asserting that the feeding tube itself is unwanted, but rather the seemingly purposeless life that it sustains is unwanted. Withholding nutrition and hydration is a practice saturated with dangers, both to individuals and to society. It should be confronted with frank admissions concerning our objectives.[102]

At the time of the *Cruzan* decision not a single reported case existed in which a court found state interests sufficient to counterbalance the PVS patient's right to refuse nutrition and hydration.[103] In both *Bouvia v. Superior Court*[104] and *In re Farrell*,[105] the courts found that the state's

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97. *Cruzan*, 760 S.W.2d at 413.

98. Defendants' Reply and Supplemental Brief at 10, Cruzan v. Harmon, No. CV384-9P (Cir. Ct. Jasper County, Mo., P. Div. Carthage 1988).

99. 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983). Another such instance was in *In re* Bayer, No. 4131. (Burleigh County, N.D. Feb. 5, 1987). The trial court ordered the feeding tube removed from an incompetent patient with brain damage. She survived when her physician determined that she could swallow if the food was placed in her mouth with a syringe. At that point, the court ordered feeding stopped altogether. D. O'STEEN, EUTHANASIA: MODERN AMERICA'S RENDEZVOUS WITH DEATH 5 (1988).

100. *Barber*, 147 Cal. App. 3d at 1010, 195 Cal. Rptr. at 486.

101. Note, *supra* note 89, at 952 (citing Prosecution's Brief).

102. Judge Blackmar, in his dissent to *Cruzan*, does confront the issue of taking a life. He writes: "The very existence of capital punishment demonstrates a relativity of values by establishing the proposition that some lives are not worth preserving." *Cruzan*, 760 S.W.2d at 428-29 (Blackmar, J., dissenting).

103. In those decisions where removal of a feeding tube was not permitted, the refusal was based upon uncertainty as to the patient's wishes. *See In re* Westchester County Medical Center, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (patient incompetent but able to answer simple questions and capable of limited bodily movements).

104. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).

105. 108 N.J. 335, 529 A.2d 404 (1987).

interest in preserving life was not sufficiently compelling to prevail over a competent patient's desire to refuse life-sustaining treatment.

Cruzan observed that the courts, since abandoning the nature of the treatment as a basis for treatment decisions, have "focus[ed] on the patient's medical prognosis and the individual patient's assessment of the quality of life in the face of that prognosis."[106] If the prognosis gives little hope of recovery, then the desire of that patient who finds the prognosis unacceptable will prevail over the state's interest.[107] When one takes this analysis to its logical end, prognosis becomes irrelevant.[108] The court quotes one commentator:

> This situation is conducive to a rhetorical justification of the cases—authorizing the patient's choice is merely allowing an inexorable dying process to continue. While this distinction is rhetorically convenient, it is not easily justifiable by principle: where the patient's right to refuse medical treatment is constant, the patient's condition and prognosis would no longer seem to be relevant.[109]

When prognosis becomes irrelevant and when the patient's wish always prevails over the state interests, the test "leads to the judicial approval of suicide."[110] The *Cruzan* court stated that, while other courts had achieved the desired result by minimizing the state interest and elevating the patient's right to refuse,[111] "we may not arbitrarily discount either side of the equation to reach a result which we find desirable."[112]

The *Cruzan* court ultimately balanced Nancy Cruzan's right to refuse nutrition and hydration against the state's interest in the preservation and the sanctity of life. Deciding that the gastrostomy tube was not burdensome to *her*, the court found Nancy Cruzan's right to refuse treatment outweighed by the "immense, clear fact of life in which the state maintains a vital interest."[113] The *Cruzan* court then turned to the issues of guardianship.[114]

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106. *Cruzan*, 760 S.W.2d at 421.

107. *Id.*

108. *Id.*

109. *Id.* at 421-22 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1366 (2d ed. 1988)).

110. *Id.* The court in *In re* Peter, 108 N.J. 365, 529 A.2d 419 (1987), held: "The privacy that we accord medical decisions does not vary with the patient's condition or prognosis [which] is generally relevant only to determine whether the patient is or is not competent, and if incompetent, how the patient, in view of that condition, would choose to treat it were she or he competent." *Id.* at ___, 529 A.2d at 423. *Cf.* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986). "[I]f the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount . . . . [A] desire to terminate one's life is probably the ultimate exercise of one's right to privacy." *Id.* at 1141, 1144, 225 Cal. Rptr. at 304, 306.

111. *Cruzan*, 760 S.W.2d at 422.

112. *Id.*

113. *Id.* at 424.

114. *Id.*

Guardianship and Third Party Consent

In *Cruzan*, the court assailed a concept which many other jurisdictions have embraced: allowing a guardian or other person to decide whether to withdraw nutrition and hydration from an incompetent person.[115] The court attacked this policy on three grounds. First, it questioned the statutory authority of a guardian to cause the death of a ward.[116] Second, the court cast doubt on whether the right to refuse nutrition and hydration could even survive the patient's becoming incompetent.[117] Finally, the *Cruzan* court viewed the notion of third party consent as imposing others' judgment, on the incompetent patient, under the guise of fulfilling the patient's wishes.[118]

Courts have used various approaches in allowing third parties to make withdrawal of nutrition and hydration decisions on behalf of incompetent persons. One approach is to determine what action is in the "best interests" of the patient.[119] The advantage of the best interest analysis is that it does not require any evidence of the patient's desires, given a certain set of circumstances.[120] Factors to consider in a best interest analysis are the prognosis, the burdens upon the patient and the quality and duration of the sustained life.[121]

But not every court has found the best interests analysis appealing. The court in *Brophy*[122] rejected it as inconsistent with personal autonomy and as too "paternalistic."[123] The *Brophy* court instead adopted the "substituted judgment" rationale which aspires to carry out the will of the patient as determined from the available evidence.[124] Substituted judgment was the preferred analysis in *In re Jobes*.[125] The *Jobes* court wrote that the substituted judgment approach was the ideal. While unworkable where

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115. *Id.*
116. *Id.*
117. *Id.* at 425.
118. *Id.* at 425-26.
119. *See* Rasmussen v. Fleming, 154 Ariz. 207, ___, 741 P.2d. 674, 688-89 (1987).
120. *Id.*
121. *Id.* at Ariz. 207, ___, 741 P.2d. 674, 689 (1987). The court clarified in footnote 23 that "quality of life" referred not to the value of the incompetent's life as determined by others, but to its value as determined by the patient. This would seemingly move the analysis into a substituted judgment situation to some extent.
122. 398 Mass. 417, 497 N.E.2d 626 (1986).
123. *Id.* at 431, 497 N.E.2d at 633. The *Brophy* dissent, on the other hand, viewed the substituted judgment of the majority as "paternalism masquerading as the mere ratification of autonomous choice." *Id.* at 448, 497 N.E.2d at 643 (Lynch, J., dissenting).
124. *Id.* at 433, 497 N.E.2d at 635.
125. 108 N.J. 394, 529 A.2d 434 (1987).

the patient has always been incompetent, the *Jobes* court held a substituted judgment appropriate for a once-competent patient if made by a family member or close friend familiar with the patient's "subjective viewpoint."[126]

Courts in other jurisdictions, since accepting the withdrawal of nutrition and hydration, have attempted to set guidelines for withdrawal to avoid judicial review. In *Jobes*, the court provided that agreement by a hospital prognosis committee or two neurology experts, the attending physician, if any, and the family and guardian would be sufficient for termination of nutrition and hydration without recourse to judicial intervention.[127] In *McConnell v. Beverly-Enterprises-Connecticut, Inc.*,[128] the Connecticut supreme court based removal of a gastrostomy tube from a PVS patient on a state statute.[129] Under the court's construction of the statute, once a substituted judgment has been made as to the "terminal" patient's wishes, the attending physician need only obtain permission from the next of kin.[130] Similar guidelines are found in other decisions, which considered court involvement appropriate only when the interested parties disagree.[131]

The *Cruzan* court's analysis of third party consent to remove a feeding tube began with the Missouri statute that governs the guardianship of an incompetent ward.[132] The court noted that the statute made no provision for termination of treatment: "[T]o the contrary, it places an express, affirmative duty on guardians to assure that the ward receives medical care and provides the guardian with the power to give consent for that purpose."[133]

In considering the common law right to refuse nutrition and hydration, the *Cruzan* court held that the guardian's power is granted by the state, not derived from the constitutional rights of the ward.[134] The court viewed

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126. *Id.* at ___, 529 A.2d at 449.

127. 108 N.J. at ___, 529 A.2d at 448. New Jersey also has Ombudsman procedures for protection of the elderly. *Conroy*, 98 N.J. at 375-76, 486 A.2d at 1241-42.

128. 209 Conn. 692, 553 A.2d 596 (1989).

129. Removal of Life Support Systems Act, CONN. GEN. STAT. ANN. §§ 19a-570 to 19a-575 (West Supp. 1988). Relevant portions of the statute are set out *infra* note 160.

130. 209 Conn. at 708, 553 A.2d at 604. The *McConnell* court's interpretation of the statute is discussed *infra* notes 158-65 and accompanying text.

131. *See* Conservatorship of Drabick, 200 Cal. App. 3d 185, 198-200, 245 Cal. Rptr. 840, 850-52, *cert. denied sub nom.* Drabick v. Drabick, 109 U.S. 399 (1988); *In re* Peter, 108 N.J. 365, 529 A.2d 419 (1987).

132. *Cruzan*, 760 S.W.2d at 424.

133. *Id.* The *Cruzan* trial court's decision to allow the withholding of nutrition and hydration was based principally upon a "best interests" analysis, but the Missouri Supreme Court never addressed the "best interest" argument directly. *Id.* at 434 (Higgins, J., dissenting) (quoting trial court). Since the *Cruzan* court recognized no constitutional right to refuse treatment, any "best interests" considerations would presumably be analyzed under the guardianship statutes.

134. *Id.* at 425.

the doctrine of substituted judgment not as an exercise of the *parens patriae* power, but rather as an abrogation of it.[135] The court cited one commentary which warned:

> [T]hird party consent allows the truly involuntary to be declared voluntary, thus bypassing constitutional, ethical and moral questions, and avoiding the violation of taboos. Third party consent is a miraculous creation of the law—adroit, flexible, and useful in covering the unseemly reality of conflict with the patina of cooperation.[136]

In addressing the idea that the guardian's power is derivative of the patient's own constitutional right, the *Cruzan* court noted the argument made in *Quinlan*.[137] The *Quinlan* court concluded, "The only practical way to prevent destruction of the right is to permit the guardian and the family of Karen to render their best judgment . . . as to whether she would exercise it in these circumstances."[138] The *Cruzan* court found the *Quinlan* doctrine of indestructible rights without precedent, reasoning that privacy rights are rooted in personal autonomy, or "self law —the ability to decide an issue without reference to or responsibility to any other."[139] Thus, the *Cruzan* court considered it "logically inconsistent to claim that rights which are found lurking in the shadow of the Bill of Rights and which spring from concerns for personal autonomy can be exercised by another absent the most rigid of formalities."[140]

III. THE OUTLOOK AFTER CRUZAN

The *Cruzan* court narrowly held that Nancy Cruzan's co-guardians had no authority to direct the removal of her feeding tube.[141] This holding does not apply to competent persons wishing to refuse life-sustaining treatment.[142] The court wrote that "[t]he burden of continuing the provision of food and water, while emotionally substantial for Nancy's loved ones, is not substantial for Nancy."[143] In classifying Nancy Cruzan's burdens as

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135. *Id.* at 426.

136. *Id.* (quoting Price & Burt, *Sterilization, State Action, and the Concept of Consent*, 1975 LAW AND PSYCHOLOGY REV. 57, 58).

137. *Cruzan*, 760 S.W.2d at 424-26.

138. 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

139. *Cruzan*, 760 S.W.2d at 425.

140. *Id.* There are numerous rights which disappear once the patient is no longer capable of personally exercising the right, for example, the right to vote, marry, or execute a will. Defendants Post-Hearing Brief at 34, Cruzan v. Harmon, No. CV384-9P (Cir. Ct. Jasper County, Mo., P. Div. Carthage 1988).

141. *Cruzan*, 760 S.W.2d at 426.

142. *Id.* at 424.

143. *Id.* at 426. Since the court rejects *any* quality of life arguments to support the withholding of nutrition and hydration, withdrawal under a sufficiently burdensome, painful situation would be based upon the recognition that the state interest in life, though undiminished, would then be outweighed by the burden on the patient.

insubstantial, the court implied that it considered some burdens great enough to overcome the state's interest in the preservation of life, but it gave no indication at what point the balance would shift.[144] Nor were principles given to govern that decision once the severity of the burden is established. These omissions were intentional.[145]

The court in *Cruzan* judged that any changes in this area should come from the people through the legislature. As courts continue to "invent guidelines on an *ad hoc* piecemeal basis, legislatures, which have the ability to address the issue comprehensively, will feel no compulsion to act . . . ."[146] *Cruzan* has expressly left the legislature unencumbered by the court's decision.[147]

The 1987 Oklahoma legislature addressed one side of the problem in its Hydration and Nutrition for Incompetent Patients Act.[148] This Act creates a legal presumption that incompetent patients have directed their health care providers to supply sufficient nutrition and hydration to keep them alive.[149] The presumption prevails unless by clear and convincing evidence the attending physician establishes that the patient, when competent, decided to forego nutrition and hydration.[150] The decision must be made with the specific illness or injury in mind and with enough information to constitute informed consent.[151] Two other factors also cause the presumption to disappear; when the feedings are not medically possible or when they cause "severe, intractable and long-lasting pain to the incompetent patient."[152] Finally, the presumption does not apply when the incompetent patient is "chronically and irreversibly incompetent" and where death due to a terminal illness or injury is imminent.[153]

The Act also confines a "terminal illness" to an illness that will result in death from the illness, itself, *regardless of the treatment provided.*[154] This exception for imminent death does not apply if withholding nutrition and hydration "would result in death from dehydration or starvation rather than from the underlying terminal illness or injury."[155]

Despite its comprehensive language, a similar statute in another state may not accomplish a goal of tightly limiting the denial of nutrition and

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144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. OKLA. STAT. tit. 63, §§ 3080.1-.5 (1987).
149. *Id.* § 3080.3.
150. *Id.* § 3080.4(A)(1).
151. *Id.*
152. *Id.* § 3080.4(A)(2).
153. *Id.* § 3080.4(A)(3).
154. *Id.* § 3080.2(7). The *Cruzan* court would apparently allow withdrawal of nutrition and hydration in this instance. *See supra* notes 144-45 and accompanying text.
155. *Id.* § 3080.4(B).

hydration. Those states recognizing a common law right to refuse treatment would be bound by such statutory language, but jurisdictions that also include a constitutional right to privacy as a basis for decision may not let the statute stand.[156]

In *McConnell v. Beverly-Enterprises-Connecticut, Inc.*,[157] the Connecticut Supreme Court circumvented statutory language which seemed to forbid the denial of nutrition and hydration. Carol McConnell, fifty-seven years old, had suffered a severe head injury due to an automobile accident.[158] Like Nancy Cruzan, she was in a PVS, with "no prospect for improvement."[159] The *McConnell* court construed the terms of the state Removal of Life Support Systems Act[160] consonant with the right to refuse nutrition and hydration.[161] Statutory language defined a terminal condition as the "final stage of an incurable or irreversible medical condition which, in the opinion of the attending physician will result in death."[162] Consistent with the statute, the patient's doctor in *McConnell* deemed her to be in a PVS, "a condition that [would] ultimately lead to her death."[163] The *McConnell*

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156. *See supra* notes 45-56 and accompanying text.

157. 208 Conn. 692, 553 A.2d 596 (1989).

158. *Id.* at 696, 553 A.2d at 598.

159. *Id.*

160. CONN. GEN. STAT. ANN. §§ 19a-570 to 19a-575 (West Supp. 1989). Relevant sections are as follows:

> Sec. 19a-570. DEFINITIONS. For purposes of this section and sections 19a-571 to 19a-575, inclusive:
>
> (1) "Life support system" means any mechanical or electronic device, excluding the provision of nutrition and hydration, utilized . . . in order to replace, assist or supplement the function of any human vital organ or combination of organs and which prolongs the dying process;
>
> (2) "Beneficial medical treatment" includes the use of surgery, treatment, medication and the utilization of artificial technology to sustain life;
>
> (3) "Terminal condition" means the final stage of an incurable or irreversible medical condition which, in the opinion of the attending physician, will result in death.
>
> Sec. 19a-571. [No criminal or civil liability for removal of life-support of an incompetent patient], provided, (1) the decision . . . is based on the best medical judgment of the attending physician; (2) the attending physician deems the patient to be in a terminal condition; (3) the attending physician has obtained the [prior] informed consent of the next of kin, if known, or legal guardian, if any . . . ; and (4) the attending physician has considered the patient's wishes as expressed by the patient directly, through his next of kin or legal guardian, or in the form of a document executed in accordance with section 19a-575, if . . . presented to, or in the possession of the attending physician at the time the decision to terminate a life support system is made. If the attending physician does not deem the patient to be in a terminal condition, beneficial medical treatment and nutrition and hydration must be provided.

161. *McConnell*, 208 Conn. at 704, 553 A.2d at 602.

162. CONN. GEN. STAT. ANN. § 19a-570(3) (West Supp. 1989).

163. *McConnell*, 208 Conn. at 708, 553 A.2d at 604.

court agreed with the terminal diagnosis, even though nothing in the court's facts indicated that she would or would not live for many years.[164] The court also construed the statutory definition of "nutrition and hydration" to include feeding with spoons and straws but not feedings by gastrostomy tube.[165]

Although the *McConnell* court did not address the constitutionality of the statute directly, the implication of this and other court decisions is that statutory language as strong as Oklahoma's would not pass constitutional muster.[166] The legislative prerogative, the absence of which has been lamented by the courts, is no bar to denial of nutrition and hydration when courts have found a constitutional basis for that denial. Yet, apart from future intervention by the United States Supreme Court, the Missouri General Assembly is unconstrained from developing the comprehensive solution that the *Cruzan* court invited.[167]

In all of the cases dealing with the right to refuse nutrition and hydration the subjects of the decisions have been hopelessly ill individuals. Despite

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164. *Id.* Contrary testimony that Mrs. McConnell was not terminally ill was also given in the trial court. *Id.* at 707, 553 A.2d at 604. The *McConnell* court did not elaborate on how a patient's condition could be terminal when the patient is not dying and could survive for years. This view would be impossible under the Oklahoma statute which defines "final stage of a terminal illness" as where death will come within a reasonably short time, and further, prohibits removal where death by dehydration or starvation would result. *See supra* notes 154-55 and accompanying text. From the facts, both Carol McConnell and Nancy Cruzan are in a PVS with no prospects for recovery nor expectations of dying soon. Nonetheless, the *McConnell* court considered its decision distinguishable from *Cruzan* because Nancy Cruzan is not terminally ill. *McConnell*, 208 Conn. at 703, 553 A.2d at 602 n.10.

165. *McConnell*, 208 Conn. at 705, 553 A.2d at 603. It is difficult to predict how far the courts will go in limiting the definition of nutrition and hydration. One expert in the *Cruzan* trial testified that even if Nancy was capable of eating from a spoon, that fact should not bear upon the decision to withhold food. *Cruzan*, 760 S.W.2d at 421 n.16. *See also supra* note 99 where a trial court ordered that feeding by mouth via syringe be terminated.

166. *See* Rasmussen v. Fleming, 154 Ariz. 207, ____, 741 P.2d. 674, 692 (1987); Corbet v. D'Alessandro, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986). Most recently, the right of a surrogate decisionmaker to terminate nutrition and hydration was upheld in *In re* Guardianship of Browning, 543 So. 2d 258 (Fla. Ct. App. 1989). Estelle Browning was found to be incompetent but not in a permanent vegetative state, suffering from an incurable, but not necessarily terminal condition. She was found to have a privacy right under FLA. CONST. art. I, § 23, allowing her to forego sustenance provided artificially by a nasogastric tube. The court held that a guardian is entitled to make this decision as a surrogate decisionmaker for the patient. The court distinguished the decision from *Cruzan* due to Missouri's "absence of a state right of privacy." *In re Browning*, 543 So. 2d at 267.

167. *Cruzan*, 760 S.W.2d at 426-27. *See* Comment, *The Dilemma of the Person in a Persistent Vegetative State: A Plea to the Legislature for Help*, 54 MO. L. REV. 645 (1989) (in this volume).

the great disagreement among the courts and commentators, the number of individuals affected remains relatively small.[168] Still, a more ominous danger exists; not in any single judicial precedent, but by a combination of the various concepts being explored.

Court decisions have laid the preliminary groundwork for assisted suicide.[169] A California proposal known as the Humane and Dignified Death Act[170] would have permitted lethal injections for patients likely to die within six months, but failed to accumulate enough signatures to get on the ballot in 1988. Backers will try again in 1990.[171] In the Netherlands, a patient undergoing severe physical or mental suffering may be given a lethal injection upon his explicit, repeated and informed consent.[172]

The question that voluntary euthanasia raises is whether it could remain voluntary. Many courts have already mapped out the constitutional right to privacy rationale and extended the right to refuse nutrition and hydration to incompetent patients by allowing the "substituted judgment" of a third party.[173] The rhetorical question posed in those cases would be the same for voluntary euthanasia: Why should a patient lose the right to voluntary euthanasia just because they are retarded or senile?[174] The answer to that question is too grave, too solemn to linger over until the day it is asked in earnest. The question is ripe now.

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168. A recent estimate of 10,000 is given as the number of permanently comatose patients alive today. Alexander, *Death by Directive*, 28 SANTA CLARA L. REV. 67, 84 (1988).

169. *See supra* notes 104-10 and accompanying text.

170. L.A. Times, April 11, 1988, at 1, col. 2.

171. N.Y. Times, May 18, 1988, at 23, col. 1.

172. Rigter, *Euthanasia in the Netherlands: Distinguishing Facts from Fiction*, 1989 THE HASTINGS CENTER REPORT 31, 31.

173. *See supra* notes 51-56 and accompanying text.

174. *See supra* notes 123-26 and accompanying text for a discussion on substituted judgment.